

No. 9409

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BANK OF TEHACHAPI (a corporation),  
*Appellant,*

VS.

CUMMINGS RANCH, INC. (a corporation), a Bankrupt,  
*Appellee.*

Upon Appeal from the District Court of the United States for the  
Southern District of California, Northern Division.

APPELLANT'S OPENING BRIEF.

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## APPELLANT'S OPENING BRIEF.

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### STATEMENT OF JURISDICTIONAL PLEADINGS AND FACTS.

The pleadings and facts which disclose the basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction upon appeal to review the order and decree are as follows, to-wit:

1. The statutory provision to sustain the jurisdiction of this Court is sub-section a of Section 47 of Title 11 of U. S. C. A. (Section 24, Bankruptcy Act), which reads as follows, to-wit:

“The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: Provided, however, That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury, shall extend to matters of law only: Provided further, That when any order, decree, or judgment involves less than \$500.00, an appeal therefrom may be taken only upon allowance of the appellate court.”

2. *General Orders in Bankruptcy*, XXVII, shows that the District Court had jurisdiction. The order reads as follows, to-wit:

“When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon.”

3. The pleadings necessary to show the existence of jurisdiction are the Order Reversing Conciliation Commissioner's Order (Tr. 22-26). The Court found that there was due to the Bank of Tehachapi over

\$30,000.00 upon certain notes secured by a chattel mortgage covering all the Bankrupt's cattle, consisting of eight hundred head or more. The order of the Conciliation Commissioner approving appraisal and fixing rental (Tr. 38-42) shows that the appraised value of the cattle is \$29,848.50.

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#### **STATEMENT OF THE CASE.**

Cummings Ranch, Inc., a corporation, filed a debtor's petition, and failing to obtain a composition amended its petition and was adjudicated a bankrupt under Section S of Section 75 of the Bankruptcy Act. The Conciliation Commissioner fixed the rental value of all the property of the debtor at \$750.00 per year (Tr. 21-22). Review was taken by Bank of Tehachapi and all of the orders of the Conciliation Commissioner were set aside and vacated, the Court having found that \$750.00 per year was not a fair and reasonable rental. The Court further directed the Conciliation Commissioner to do certain things (Tr. 22-26). Thereafter the Conciliation Commissioner made an order approving appraisal and fixing rental (Tr. 38-42), the cattle being appraised at \$29,848.50, and the rental value being placed on the cattle of \$2203.50. The order further included \$1184.00 for rental on land not owned by the Bankrupt, but as stated in the order "as now being used by debtor". Prior to the order and on or about March 24th, a hearing was had in which the Appraiser appointed by the Court testified as to the value of the property

and the rental value being the same in substance as found by the Conciliation Commissioner, and at that time the Bank of Tehachapi, and after Cummings Ranch had introduced all its testimony, made a motion that the Conciliation Commissioner recommend to the Judge of the above entitled Court to dismiss the petition (Tr. 30-32), and made a motion for order authorizing the Bank to foreclose upon its mortgage, both of which were denied, and writ of review was then taken (Tr. 26-32) and after the Court had made its order fixing the rental, dated April 5, 1939, the Bank of Tehachapi filed its petition for writ of review from said order (Tr. 34-45). The main questions raised by the motions were: first, that there is no emergency existing; second, that there is no chance for the debtor to rehabilitate itself within the three-year period; third, that said order is contrary to the provisions of sub-section 2 of Section S of the Frazier-Lemke Act, which includes property not owned by debtor; and fourth, that the order providing that the rental may be paid for State and County taxes, improvement liens, assessments and expenses of administrations is to deprive the Bank of Tehachapi of a portion of its lien upon the property under its chattel mortgage, for the benefit of other creditors, the debtor and his attorneys. Judge Leon Yankwich, on October 23rd, made his order (Tr. 46-49) confirming and approving the order of the Conciliation Commissioner, excepting he found that \$10,404.00 had been paid pursuant to his order, and the writs of review of the Bank of Tehachapi were denied and exceptions were allowed.



**SPECIFICATIONS OF ERROR.**

Appellant specifies the following error, relied upon in this appeal, as follows, to-wit:

*Specification No. 1.* The Court erred in its Finding in the order dated October 23, 1939, signed by Judge Yankwich (Tr. p. 29) "in that the matter of Supervisor for the care of the cattle and the payment of \$10,000.00 to the Bank of Tehachapi had been complied with"; in that there was no evidence before the Court, no evidence having been taken by the Conciliation Commissioner as to whether or not a supervisor was necessary, and no cattle had been sold when Review was taken by the Bank of Tehachapi.

*Specification No. 2.* The Court erred in its finding of fact in the following particulars, to-wit: That finding No. II "that sum of \$10,404.00 was obtained from the sale of cattle" of the same order as mentioned in Specification No. 1, as no cattle were sold at the time Writ of Review was taken and no evidence of same was before the Court.

*Specification No. 3.* The Court erred in its finding of fact in the following particular, to-wit: That finding No. III as to sale of cattle of the order mentioned in Specification No. 1 is in error as there was no sale of cattle at the time of the Writ of Review or no evidence before the Court of sale of the cattle, and that the rental value should be reduced as to that portion of the property where rental is fixed upon property that is not owned by bankrupt.

*Specification No. 4.* The Court erred in its order as mentioned in Specification No. 1 above, for the reasons mentioned in Specifications No. 1, 2 and 3.

*Specification No. 5.* The Court erred in its findings of fact and in its order and decree of October 23, 1939, in that it should have granted an order to the Bank of Tehachapi dismissing the bankruptcy petition of the bankrupt Cummings Ranch and granted an order allowing the Bank of Tehachapi to foreclose upon its chattel mortgage, and should have allowed the Writs of Review of the Bank of Tehachapi of April 4, 1939 and of April 9, 1939, for the reason that the bankrupt Cummings Ranch is so hopelessly insolvent that it is impossible for it to rehabilitate itself within a three-year period or within any other time.

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**SPECIFICATION OF EVIDENCE.**

*Debtor's Indebtedness, 1923:*

(Tr. 74)

Mortgage on ranch (Mrs. Kelly)	\$25,000.00
Mortgage on cattle	15,000.00
Notes	5,250.00
	<hr/>
	\$45,250.00

Had on hand 800 head of cattle, 50 head of horses and 200 hogs, besides farming equipment worth \$3500.00, and the ranch.

*Debtor's Indebtedness, 1927:*

(Tr. 75)

Mortgage on ranch (Mrs. Kelly)	\$37,330.00
Mortgage on cattle (To Banks)	17,400.00
Note, J. J. Lopez	7,000.00
Note, Mrs. Asher	3,000.00
Other notes and accounts payable, about	2,300.00
	<hr/>
	\$67,030.00

Livestock and cattle approximately the same as in 1923.

*Debtor's Indebtedness, 1928:*

(Tr. 76)

Debtor's indebtedness at the end of the year 1928, is about the same as the year 1927, and the property owned by the corporation is approximately the same, but in addition, the statement shows that the corporation suffered a loss during the year of \$2,808.13.

Debtor obtained \$25,000.00 from Federal Government agency from loan on ranch and Mrs. Kelly accepted \$23,750.00 as full settlement of the note due to her of over \$37,000.00; so there was a saving made by the debtor of over \$14,000.00.

*Debtor's Financial Condition as per Court  
Appraisal of April 5, 1939:*

Bankrupt owns:

Real estate according to Appraisement (Tr. 39)	\$40,100.00
Personal property	31,358.50
	<hr/>
	\$71,458.50

Bankrupt owes:

Bank of Tehachapi (Tr. 23) about	\$33,628.00
Federal Land Bank (Tr. 63)	21,416.00
Federal Mortgage Corporation (Tr. 63)	4,997.00
J. J. Lopez (second mortgage on cattle) (Tr. 64)	12,000.00
Mrs. Charles Asher (Tr. 85)	6,983.00
Delinquent taxes (Tr. 62)	225.00
	<hr/>
	\$79,249.00

There is of course, no doubt that the Court appraisal is too high in a great many respects, and there is a lot of interest accumulation to be added to some of the indebtedness, which will make the indebtedness larger.

*Overhead:*

Real estate taxes are about \$500.00 per year. Interest due on Federal Land Bank about 4%, which is about \$1040.00 per year. Interest on other loans amounts to an average interest of 7%, which is about \$2870.00. The

interest and taxes amount to *over \$4000.00 a year*. This does not take into consideration anything for the operation of ranch and expense of feeding the cattle. The evidence shows that the ranch cannot be used except about five months in the year and other property has to be rented in the valley for winter range, which rental amounts to \$1184.00 a year (Tr. 41). Debtor corporation also hires an additional party as caretaker, upon the winter range.

**Examination by Conciliation Commissioner of Albert Ancker, President of Bank of Tehachapi, and Statements Made by Conciliation Commissioner. (Tr. 87.)**

“Q. (by the Court). That is true, but renewed in '34 but since then you have loaned several thousand dollars?

A. Yes.

Q. And you knew what kind of business Mr. Cummings was doing, didn't you?

A. Certainly.

Q. He has reported to you how many head of cattle he had all the time, hasn't he?

A. I took his word for it, certainly.

Q. Took his word for it?

A. Certainly.

Q. And you were satisfied the way he was running his business?

A. I had to be satisfied because I didn't want to cripple him.

Q. And you were continually loaning money and now Mr. Johnston is trying to show that Mr. Cummings can't possibly make it?

A. He can't because he hasn't done it.

Q. *For a number of years he hasn't been able to make a go of it, yet you, with your eyes open, have loaned this man several thousand dollars and you knew his business, you knew what he could make and couldn't make. He kept you informed and you had every chance to find out whether his business was paying or not, yet you were willing to loan him the money. I want the record to show that.*

A. Can I answer you?

Q. Yes.

A. It is because I have been 46 years in the bank and this is the second time I have only foreclosed. I have been easy with them; that is what is the matter.

Q. I am not criticizing you for foreclosing, but why did you loan him this money all along for several years?

A. Because I thought he was honest and straight; that is the reason.

Q. Did you know he was going behind?

A. No sir.

Q. Did you try to find out if he was going behind?

A. I loaned him as thousands of others I have loaned in there.

The Court. *It seems to me it comes rather late to complain about the way he is running his business now when you had all these years in the past to cut him off and say, 'You are not going to get any money*

*to run the ranch, you can't possibly make it.' But you went ahead and loaned thousands of dollars.*

The Court. Yes, but a review of this loan would show it is increasing all the time.

Mr. Ancker. Yes, increasing, the loan, certainly.

The Court. And still you keep on. If you want to throw your money away, whose fault is it but your own?

Mr. Ancker. Is that the case because I should lose it now?

The Court. *No, this man is asking the Court to give him three years time and a chance to rehabilitate himself and the law has every intention of giving it to him.*

Mr. Ancker. Yes, sir.

The Court. *Unless you can show it is absolutely impossible for him ever to come out.'*

(Tr. 87 to 90, inc.)

## POINTS OF LAW.

### I.

That as to specifications of error from 1 to 4, appellant is not setting forth any decision or citation for the reason that it is too elementary that where a matter has not been heard by a Conciliation Commissioner or a Referee in Bankruptcy, that the matter is not heard before the District Judge, and the record before the Court shows that the matters complained of in Specifications Nos. 1 to 4 inclusive, were not matters to be heard or considered by Judge Yankwich,



and Judge Yankwich would not have included those matters in his order if he had known that none of them had been heard or determined by the Conciliation Commissioner at the time the Writs of Review were taken by the Bank of Tehachapi.

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## II.

### **BANKRUPT IS ALLOWED TO RETAIN POSSESSION OF HIS PROPERTY.**

Paragraph 2 of sub-section (S) of Section 75 of the Bankruptcy Act provides:

“\* \* \* during such three years the debtor shall be permitted to retain possession of all or any part of his property in the custody and under the supervision and control of the Court, provided he pays a reasonable rental semi-annually for that part of the property of which he retains possession”.

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## III.

### **WHERE IT IS EVIDENT THAT REHABILITATION OF A FARM DEBTOR IS NOT POSSIBLE, THE COURT MAY DISMISS PROCEEDINGS.**

Paragraph 3 of sub-section (S) of Section 75 of the Bankruptcy Act provides:

“If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, *or is unable to refinance himself within three years, the court may order the ap-*



*pointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act."*

At page 743:

"Paragraph 3 also provides that 'if \* \* \* the debtor at any time \* \* \* is unable to refinance himself within three years', the court may close the proceedings by selling the property. This clause must be interpreted as meaning that the court may terminate the stay if after a reasonable time it becomes evident that there is no reasonable hope that the debtor can rehabilitate himself within the three-year period."

*Wright v. Mountain Trust Bank*, U. S. Sup. Court 300 U. S. 440, 81 Law. Ed. 736.

"If there is no hope that rehabilitation can be effected in that time, so that the farmer may retain possession and still protect the rights and interest of all creditors, then a dismissal of the proceedings might be proper, or, if not a dismissal, an order permitting the creditor to foreclose its secured lien."

*In Re Moser*, 95 Fed. (2d) 944, 9th Circuit.

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#### IV.

##### NO EMERGENCY EXISTING.

Quoting from *Wright v. Mountain Trust Bank*, at page 743, 81 L. Ed., commencing at the last sentence of that page:

"Finally, the intention of Congress to make the stay terminable by the court within the three

years is shown by paragraph 6, which declares the Act an emergency measure, and provides that: 'if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate'. Since the language of the Act is not free from doubt in the particulars mentioned, we are justified in seeking enlightenment from reports of Congressional committees and explanations given on the floor of the Senate and House by those in charge of the measure. When the legislative history of the bill is thus surveyed, it becomes clear that to construe the Act otherwise than as giving the courts broad power to curtail the stay for the protection of the mortgagee would be inconsistent not only with provisions of the Act, but with the committee reports and with the exposition of the Bill made in both Houses by its authors and those in charge of the Bill and accepted by the Congress without dissent. We construe it as giving the courts such power."

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## V.

### THE ORDER PROVIDING THAT RENTAL MAY BE USED TO PAY TAXES AND EXPENSES OF ADMINISTRATION, DEPRIVES BANK OF A PORTION OF ITS LIEN.

Quoting again from *Wright v. Mountain Trust Bank*, at page 741, 81 L. Ed., as follows:

"Third. It is not denied that the new Act adequately preserves three of the five above enumerated rights of a mortgagee. 'The right to retain the lien until the indebtedness thereby secured is paid' is specifically covered by the pro-

visions in paragraph 1, that the debtor's possession, 'under the supervision and control of the court', shall be 'subject to all existing mortgages, liens, pledges, or encumbrances', and that:

'All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.' "

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## ARGUMENT.

### II.

#### BANKRUPT IS ALLOWED TO RETAIN POSSESSION OF HIS PROPERTY.

The Bankrupt, as provided by the authorities cited under the Points of Law, is allowed to retain his property, providing he pays a reasonable rental for the same, and the order is in error in including rental of \$1184.00 for rental of property "now being used but not owned by debtor" (Tr. 40). The item is No. 12 in the Conciliation Commissioner's order, and the whole thereof should have been stricken.

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### III.

#### WHERE IT IS EVIDENT THAT REHABILITATION OF A FARM DEBTOR IS NOT POSSIBLE, THE COURT MAY DISMISS PROCEEDINGS.

The Court in this case should dismiss the Bankrupt's bankruptcy petition, or should allow the Bank

of Tehachapi to take any and all legal steps under its mortgage to enforce the collection of its notes, for the reason that the Bankrupt is in such a hopelessly insolvent condition that there is no chance for Bankrupt to rehabilitate itself. The statements of the Bankrupt as to its financial condition from 1923 to date show that it has been steadily growing worse, excepting as to one year where it obtained a compromise settlement with Mrs. Kelly when she took approximately \$23,000.00 to settle the indebtedness due her of \$37,000.00. The Bankrupt's debts in 1923 were \$45,000.00. The debts in 1927 were \$68,000.00. The debts in 1928 increased and the assets decreased, and there has been since that date a steady increase in indebtedness and a steady decrease in assets. The statements of the corporation show that from the years 1923 to 1928, which were during the most prosperous years that this country has ever enjoyed, there was a loss of over \$20,000.00 suffered by the corporation, or an average loss of over \$4000.00 per year. Bankrupt's income from the years 1934 to 1938 inclusive, from the sale of cattle, has been approximately \$16,500.00 and that amount divided by five would make a gross income of \$3300.00 a year, and the corporation has no other income except a little income from the sale of chickens and a little revenue from the sale of firewood, not exceeding \$100.00 a year (Tr. 99).

There is due to the Bank of Tehachapi over \$33,000.00 upon notes secured by a first chattel mortgage upon the cattle, and there is due to J. J. Lopez, a note secured by second chattel mortgage upon the cattle, the balance due Lopez being \$12,000.00, plus about

two years' interest at 7%. The Bankrupt has no chance to refinance itself within the next three years or to rehabilitate itself and pay off the indebtedness to the Bank and to the Lopez executor.

Both the Bank and Lopez during his lifetime, had agreed to take substantial discounts but the bankrupt was unable to secure any refinancing.

There is indebtedness of over \$45,000.00 upon the cattle and the cattle are appraised at less than \$30,000.00. There is no doubt that the appraisement is too high.

The total assets as appraised by the appraiser are a little over \$71,000.00 and the total indebtedness is a little over \$79,000.00, but to the indebtedness there must be added interest. The overhead, interest and taxes amount to over \$4000.00 a year. The amount necessary to pay for rental land is \$1184.00 (Tr. 41) and the bankrupt corporation pays a caretaker \$50.00 a month, plus his food (Tr. 87) which would be \$600.00 a year, which would make \$5784.00 per year. This does not take into consideration incidental expense, repair, upkeep, and new equipment necessary in the operation of a successful cattle ranch.

It is to be noted that of the interest, the amount due to Lopez and to the Bank of Tehachapi amounts to about \$2870.00 per year, and that the \$600.00, for caretaker, and the \$1184.00 rental, which would make a total of \$4654.00, are all necessary for the operation of the cattle. There is not at the present time nor has there been any profit from the operation of cattle by bankrupt corporation within the last fifteen years. In

fact the bankrupt corporation has been running behind at least \$3000.00 per year since the year 1923.

The Conciliation Commissioner fixed the rental at \$6000.00, but he built up the rental by including as heretofore pointed out to the Court, \$1184.00 upon property not owned by the bankrupt but rented by the bankrupt, so that amount deducted from the \$6000.00, would make the year's rent \$4816.00, which is not a sufficient amount to pay the total amount of the overhead, interest, taxes, caretaker, and rental of property.

The bankrupt corporation will be no better off at the expiration of three years except that it will owe more money, but the Bank of Tehachapi will be worse off as its security will have decreased. There is no possible chance for the Bank to realize all of its money now or at a later date.

The appraised value of the cattle is between four and five thousand dollars less than the amount due to the Bank and the Lopez Executor will not release the second chattel mortgage, but insists upon payment of the indebtedness or some settlement, so that the Bankrupt cannot refinance itself in any manner.

Appellant has offered to take a substantial discount and is still willing to take a substantial discount as it knows that there is no chance for the Bankrupt to rehabilitate itself. The past performance of the officers of the bankrupt corporation shows that they cannot operate the corporation at a profit. The corporation officers have been the same for the last fifteen years.



## IV.

**NO EMERGENCY EXISTING.**

The bankrupt corporation, as heretofore pointed out to this Court, has been insolvent for a good many years, and there is no emergency existing as far as the corporation is concerned, and the petition of the Bankrupt should be dismissed.

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## V.

**THE ORDER PROVIDING THAT RENTAL MAY BE USED TO PAY TAXES AND EXPENSES OF ADMINISTRATION, DEPRIVES BANK OF A PORTION OF ITS LIEN.**

The order provides that rental be used to pay taxes and expenses of administration, and if the rental that has been fixed as reasonable rental upon the cattle is used for any other purpose than paid to the Bank upon its mortgage, it would deprive the Bank of its lien under its chattel mortgage, for the reason that the cattle are depreciating in value each year. Cows are only good for a certain number of years. The barren cows have to be eliminated each year. New bulls should be purchased at proper intervals if the herd is to be kept up. When the herd is put out upon a rental basis, then all of the rental should be paid to the person having the first mortgage.

**CONCLUSION.**

We submit that the order of the Conciliation Commissioner and the order of the District Judge should be vacated and set aside, and that orders should be made authorizing the Bank of Tehachapi to foreclose under its chattel mortgage or take any other legal steps as provided under the chattel mortgage to enforce payment of its notes secured by said chattel mortgage, or that an order be made dismissing the bankruptcy proceedings.

Dated, Bakersfield, California,  
February 28, 1940.

Respectfully submitted,

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